



U.S. ENVIRONMENTAL PROTECTION AGENCY

U.S. DEPARTMENT OF JUSTICE

APR 17 2018

MEMORANDUM

SUBJECT: Agreements with Third Parties to Support Cleanup and Reuse at Sites on the Superfund National Priorities List

FROM: Cynthia L. Mackey, Director
Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Thomas A. Mariani, Jr., Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

TO: Superfund National Program Managers, Regions 1-10
Regional Counsels, Regions 1-10
Deputy Chiefs and Assistant Chiefs, Environmental Enforcement Section

As reflected in the 2017 Superfund Task Force Recommendations,¹ the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) are committed to addressing liability concerns to encourage third-party cleanup and reuse at Superfund sites. Accordingly, we are encouraging Regions to consider more frequent use of site-specific agreements with third parties at sites on the Superfund National Priorities List (NPL).²

Background

Before the 2002 Brownfields Amendments³ added the bona fide prospective purchaser (BFPP) liability protection provisions⁴ to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), prospective purchaser agreements (PPAs) were a tool that EPA

¹ Available on EPA's website at <https://www.epa.gov/superfund/superfund-task-force-recommendations>.

² See Superfund National Priorities List Web page at <https://www.epa.gov/superfund/superfund-national-priorities-list-npl>.

³ Small Business Relief and Brownfields Revitalization Act, Pub. L. 107-118 (Jan. 11, 2002) (Brownfields Amendments).

⁴ CERCLA § 107(r), 42 U.S.C. § 9607(r).

and DOJ frequently used to address the liability concerns of third parties who wanted to purchase and reuse contaminated properties. Because the self-implementing statutory BFPP protection addressed many of the liability concerns of prospective purchasers, EPA indicated in a 2002 guidance that federal involvement would no longer be necessary in most private party transactions and that the federal government generally would no longer be entering into PPAs except in limited circumstances.⁵ In 2006, however, EPA and DOJ recognized that an agreement may be appropriate for BFPPs interested in performing cleanup work beyond what would be expected of them to maintain their BFPP liability protection.⁶

Agreements with Third Parties for Cleanup and Reuse at NPL Sites

Although federal involvement continues to be unnecessary at the vast majority of contaminated properties, EPA and DOJ recognize that a site-specific agreement with the federal government may be useful at some sites of federal interest, e.g., sites on the NPL, to address the liability concerns of a BFPP, prospective purchaser, or other third party at the site to foster cleanup and reuse. Accordingly, as reflected in the Superfund Task Force Recommendations, we are encouraging Regions to consider more frequent use of BFPP agreements and PPAs at NPL sites, as appropriate.

As part of the Superfund Task Force Recommendations, EPA and DOJ also are reviewing the BFPP and PPA model agreements to identify model provisions in those agreements that warrant revision. In conjunction with issuance of revised BFPP and/or PPA models, EPA and DOJ also may issue additional policy statements or a more comprehensive guidance regarding the appropriate use of these types of agreements.

In addition to site-specific BFPP agreements and PPAs, Regions also may consider using other tools, including comfort/status letters, to address site-specific liability concerns of third parties interested in cleaning up and reusing contaminated property. Under the Superfund Task Force Recommendations, EPA is streamlining processes to ensure the timely use of these site-specific tools. More information for third parties interested in the cleanup and reuse of contaminated properties is available from the Superfund cleanup policy and guidance documents database at <https://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

To support Regions in their efforts to provide timely site-specific agreements, Helena Healy, Deputy Division Director, Policy and Program Evaluation Division, Office of Site Remediation Enforcement, will serve as the Headquarters' agreements coordinator. Helena and her staff are available to provide support in the development of a site-specific agreement. Regional staff should contact Helena (healy.helena@epa.gov or 202-564-5124) and the appropriate person in DOJ (staff attorney, if one is assigned, or Assistant Section Chief in the applicable DOJ litigating group) when developing an agreement. Because BFPP agreements and PPAs require DOJ signature, early involvement of the appropriate DOJ staff is advisable.

⁵ See "Bona Fide Prospective Purchasers and the New Amendments to CERCLA" (May 31, 2002) at <https://www.epa.gov/enforcement/guidance-bfpps-and-new-amendments-cercla>.

⁶ See "Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser" (Nov. 27, 2006) available at <https://www.epa.gov/enforcement/guidance-model-bfpp-agreement-removal-action>.

For questions or additional information on the use of agreements with prospective purchasers or other third parties, please contact Hollis Luzecky (luzecky.hollis@epa.gov or 202-564-4217) or Susan Boushell (boushell.susan@epa.gov or 202-564-2173) at EPA, or Leslie Allen (leslie.allen@usdoj.gov or 202-514-4114) at DOJ.

cc: Susan Parker Bodine, Office of Enforcement and Compliance Assurance
Jeffrey H. Wood, Environment and Natural Resources Division
Barry Breen, Office of Land and Emergency Management
Matthew Z. Leopold, Office of General Counsel
James E. Woolford, Office of Site Remediation and Technology Innovation
David R. Lloyd, Office of Brownfields and Land Revitalization
John Michaud, Office of General Counsel
Cleanup Liability and Reuse Action Team